

ADMINISTRATIVE APPEAL DECISION

MR. GEORGE TAYLOR, TRI-STATE TRUCK

LOUISVILLE DISTRICT FILE NO. 200100771

OCTOBER 15, 2003

Review Officer: Karon M. Marzec, U.S. Army Corps of Engineers (USACE),
Great Lakes and Ohio River Division, Chicago District

Appellant: Mr. George Taylor, d/b/a Tri-State Truck

Jurisdiction: Section 404 of the Clean Water Act (33 U.S.C. 1344)

Receipt of Request for Appeal (RFA): January 22, 2003

Site Visit/Appeal Meeting Date: August 14, 2003

Background Information: The appeal pertains to property located off State Route 62 west of Chandler, Warrick County, Indiana. The site is approximately 60 acres in size and lies in the 100-year floodplain of Pigeon Creek, a primary tributary to the Ohio River. The parcel is accessed from Indiana Highway 62, which is effectively the southern boundary of the property. At some point in the past, Pigeon Creek was channelized. The site is part of a broad, flat floodplain with Weisheimer Ditch lying along the east side of the property and a portion of the original (unchannelized) channel of Pigeon Creek meandering through the northern portion of the site. The surrounding land use is largely agricultural with housing and small businesses clustered along Highway 62. The low lying area to the north and east of the property, along the meandering path of historic Pigeon Creek is palustrine forest. The site has been used as a salvage yard where derelict vehicles and machinery were stored, stripped for parts and sold to the public. Mr. Taylor and his former partner, James Brown, purchased the property in 1987 and the property had been continuously filled and manipulated over the course of four or five decades before they purchased it. Tri-State Truck placed fill on top of fill existing on the site when it was purchased in 1987.

On June 6, 2001, Louisville District, Newburgh, Indiana, Field Office personnel, Tunis McElwain and Richard Funk, approached Mr. Taylor at his Tri-State Truck business location. He was informed that he was in violation of Section 404 of the Clean Water Act for filling jurisdictional wetlands along and adjacent to Weinsheimer Ditch and the historic channel of Pigeon Creek. On August 21, 2001, the Louisville District (District) sent a formal Cease and Desist letter by certified mail to Mr. Taylor and offered the opportunity for an after-the-fact permit. Mr. Taylor stated that Mr. McElwain subsequently inspected his property on three or four other occasions and that the acreage of the alleged violation changed with each visit.

Mr. Taylor stated his impression that Darlene Dannels, the District project manager for the after-the-fact permit action, told him that fill placed on existing fill, particularly fill whose base may have been existing before 1972 or 1977, is not considered jurisdictional. He also provided five letters from the Indiana Department of Transportation that he believes were permissions to fill the property. He stated that he had no knowledge of a permit requirement from the Corps of Engineers until shortly before Mr. McElwain's visit to his business location. He believes the inspector from the Indiana Department of Environmental Management has assessed the wetland acreage impacted by filling activities to be less than the Corps estimate. He was trying to get permits through Rudolph Black Top Company and Koberstein Trucking Company when he was contacted by the Corps regarding his alleged violation. He stated that "the Indiana Highway Department advised us we should go through our contractors to get these permits."

Information Received from the Louisville District during the Appeal Review and its Disposition: In addition to the administrative record, the District provided:

- Site Investigation Report field data sheet dated June 6, 2001 and a hand annotated copy of an aerial photo for Mr. Taylor's site. Accepted as clarifying information missing from the Louisville District file provided for the appeal.
- Photocopies of three photos dated April 30, 1996, showing the extent of flooding on the Tri-State Trucking site. The photos have no source identified but are accepted as clarifying information to document the extent of flooding experienced at this site.
- Site Investigation Report field data sheet dated September 6, 2001, by Tunis McElwain, for Mr. Taylor's site. Accepted as clarifying information missing from the Louisville District file provided for the appeal.
- Site Investigation Report field data sheets dated January 21, 2002, by Tunis McElwain, for Mr. Taylor's site. Accepted as clarifying information missing from the Louisville District file provided for the appeal.
- Indiana Department of Environmental Management Fax Transmission sheet dated November 18, 2002, inquiring about additional data on the Taylor site and the determination of the wetland areas. Accepted as supporting information.

Information received from the Appellant during the Appeal Review and its Disposition:

- A July 11, 2003, letter of transmittal and twenty-four color photos showing the excavation for the installation of a fiber-optic line along the front of the Tri-State Truck site. Mr. Taylor wanted these photos reviewed to show that the site had been filled repeatedly over a span of years. The photos were reviewed but not

accepted as clarifying information since they covered none of the areas encompassed by the appeal.

Appeal Decision and Instructions to the Louisville District Commander (DE):

Reasons for Appeal (paraphrased by the RO):

Appeal Reason 1: Mr. Taylor disagrees with the Louisville District's determination that jurisdictional wetlands are/were present on his Tri-State Truck property.

Appeal Reason 2: Past placement of new fill on existing fill did not impact wetlands.

Summary of Decision: Appeal reasons 1 and 2 are found to have no merit. The District's decision of April 1, 2002, is found to be reasonable.

Action: None required.

Discussion: The Tri-State Truck site has been examined on at least three documented occasions before the August 14, 2003, site visit associated with this appeal review. Representatives of the Louisville District, principally Tunis McElwain, have examined the site and documented the results in accordance with the procedures found in the 1987 Corps of Engineers Wetland Delineation Manual (Technical report Y-87-1) including the methodology described for delineations in disturbed circumstances. Onsite data collection in accordance with 33 CFR 326.3 and the Corps 1987 Manual was performed and field data and locations were compared and interpolated against aerial photos dated 1992, 1996 and 2000, the soils map for Warrick County, the National Wetland Inventory map and U.S. Geological Survey topographic maps. Data sheets and site investigation reports detail what was observed at the site and how Mr. Taylor's inquiries and information were taken into account during this process. A Natural Resources Conservation Service (NRCS) Food Security Act determination document dated November 1, 2001, indicates that Mr. Taylor had 17.2 acres classified as Wet and 0.6 acre classified as WX (Wet filled after 12/23/2003) as well as the stream channels listed as NI (not inventoried.) Some of these areas closely approximate the areas identified by the Corps in the alleged violation and reinforce the District's jurisdictional delineation.

The Pigeon Creek flood plain frequently floods and 1996 photos of Mr. Taylor's site show it covered in standing water. This recurring flooding/saturation of the fill contributes to the development of wetland in the more recent fill. Mr. Taylor stated that the local drainage district provided dredged material from Weinsheimer Ditch/Pigeon Creek that he utilized for fill. These materials would have been fine grained, saturated and structureless. This could have contributed to the formation of wetlands in the fill profile in conjunction with the recurring flood events.

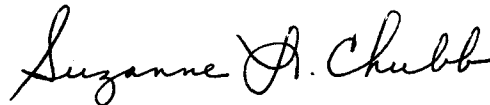
A February 22, 2002, Memorandum for the File details the materials and techniques used to derive the final aquatic impact acreage for the District's Public Notice. The District

properly exercised its authority at 33 CFR 328.3(a)(3) and (7) to identify waters of the United States on the Tri-State Truck property and the connection to the Ohio River, an interstate navigable water of the United States (33 CFR 329).

The District's site visit memoranda documented impacts on vegetation, including shrubs and trees, in areas that had received fill on top of and beyond the edges of the historic fill with more recent material pushed or falling over into wetlands and the waters of Weinsheimer Ditch and Pigeon Creek. This supports the District's decision that filling has impacted waters of the United States, including wetland areas on and beyond the historic fill.

Conclusion: For the reasons stated above, I conclude that this Request For Appeal does not have merit. The Louisville District conducted its evaluation in accordance with all applicable Corps regulations and sufficiently documented its findings and jurisdictional decision.

FOR THE COMMANDER:

A handwritten signature in cursive script, reading "Suzanne L. Chubb".

SUZANNE L. CHUBB
Regulatory Program Manager
Great Lakes & Ohio River Division